Social Science and Judicial Studies: Lessons from the US and Europe

by

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(Kick-off Meeting, Menu for Justice, Corte di cassazione, Rome, February 5th, 2010)

The study of the administration of justice in the broadest meaning of the term - taking into account all sorts of courts and judicial personnel: judges, prosecutors, attorneys, administrative staff…- is, at least in principle, interdisciplinary: it deals with legal rules, but also with behaviour, expectations and values. Its development in Europe has been relatively late, but the changing relationships between courts and the political system in the second part of the XX century and the present context of European unification offer an important chance for the future.

1. *The traditional disregard for judicial studies in Europe*

Traditionally, in continental Europe the study of the administration of justice has played a minor role, especially in the university. This disregard is related to the "mouth of the law" definition of the judicial role that, since the French Revolution, has for a long time prevailed. In fact, following the Napoleonic reorganization and the reforms implemented in constitutional States during the XIX century, the role of the judge was defined in terms of a neutral applier of the law, as enacted by Parliament. In this way, also the independent position of the judge came out justified: independence from political power – i.e. from the executive - allowed him to faithfully implementing the will of the people, as represented by Parliament.

Therefore, since the judge was only applying the law, without any significant autonomous intervention, there was no real need to take into account its role. It was enough to consider the (positive) law. So, legal education concentrated on positive law – the statutes. The knowledge of the law – and of the legal techniques necessary in order to interpret the law and find the "right answer" to the case at hand – was considered to be

the necessary and sufficient condition for the good lawyer and therefore also for the good judge.

2. United States: the rise of judicial power and the birth of judicial studies

The situation in the US was different in several significant aspects. First of all, almost since the establishment of the Constitution of 1787 the legislative power of American judges has been recognized: at least, since the well-known Marbury vs. Madison case of 1803 formally introduced the judicial review of legislation into the American constitutional system. Since then, American judges have always played a significant, although variable, political role. As Tocqueville remarked in 1832, "in the United States there is no political issue that sooner or later will not come before a court" (1981, 370). Judicial decisions played in increasingly important role in American politics: even in a negative way, as the Dred Scott vs. Sanford case, decided in 1857, that paved the way to the Civil War (at least, this has been the opinion of several historians). One of the consequences of the political salience of courts was that judges were often appointed with a strong political background: from John Marshall to Roger Taney, many had filled important government or parliamentary positions before coming to the bench. In fact, since the autonomous contribution of judges to decisions was well known, their political orientation was taken into account in the process of appointment. As Abraham Lincoln put it, when appointing the Chief Justice of the Supreme Court, "…we must take a man whose opinions are known".[1]

Therefore, the myth of judicial neutrality was never strong in the American context and was definitively exploded, in the first decades of the XX century, by the Legal Realists, who pointed out the role judges had in courts' decision-making, criticizing the theory of "mechanical jurisprudence". This fact was well-known to a vast array of social and political actors trying to influence the appointing process, which in the US has always allowed wide room to political and social pressures. However, social and political influence on courts had also the consequence of negatively affecting their effectiveness:

[1] Actually, in that case the choice came out to be, at least for Lincoln, a mistake (Murphy and Tanenhaus, 1972, 99).

since the end of the XIX century, corruption and mismanagement characterized American courts, especially at the state level. The reaction was a movement aiming at introducing radical reforms. In that context the discipline of judicial administration took shape in the 1920s and 1930s. It was part of a broader movement aiming at reforming public administration, removing political and corrupting influences (considered to be strictly related) and improving organizational performance. The introduction of modern management techniques into the administration of justice was considered a way to entrust the management of courts to competent professionals and therefore to fight political clientelism, at the same time responding to citizens' demands for better justice.

Judicial studies expanded further after the Second World War, following the development of the social sciences, developing several fields of teaching and research. The already mentioned discipline of court management, devoted to the analysis of the judicial organization with a view at improving its performance, has been further supported by the growing influence of the law and economics approach. Other significant fields of inquiry are the law and society movement - aiming at putting the law in the social context, by analysing its social impact, on the one hand, and the way it is influenced by the social environment, on the other (Friedman 1975; Halliday, Karpik and Feeley 2007) – and the so-called "political jurisprudence", which considers the judges first of all as political actors, although with their specificity (Shapiro and Stone 2002). The last 50 years have seen an enormous growth of social science studies on law and courts: today, all prestigious universities have courses on courts' organization and politics, while the scientific congresses of all social sciences devote several panels to similar subjects.

3. *The European changing context*[2]

As we have already pointed out, in continental Europe judges tended to act in a subordinate way to the political branches and to the norms they enacted, a fact reflecting an historical interpretation of the separation of powers principle that assigns a privileged

[2] I deal here with continental Europe. The experience of Britain is partly different: see the report by Cheryl Thomas.

role to the legislature - since it represents the popular will - and excludes any form of judicial review of legislation. This subordinate interpretation of the judicial function was supported by a congruent organizational setting, according to which judges were organized as a special corps of the public bureaucracy. As a rule, they were – and most of them still are - recruited directly from university through some form of public examination, and with no requirement of previous professional experience. Successful candidates were – and often still are - appointed at the bottom of the career ladder, and professional training and socialisation took place within the judiciary, with promotions usually granted on the basis of seniority and merit through formalized procedures managed by higher ranking judges. The professional skills of the judge had to be mostly acquired inside the judicial organization, through an informal process in which older and higher judges played a major part.[3]

The second part of the XX century has been characterized by significant reforms of the institutional setting of the judicial system, with the consequence of a strong increase in the political significance of courts. The first of these reforms —at least diachronically—has been the introduction of forms of judicial review of legislation. Constitutional review developed much later in Europe than in the United States. After the *ancien régime*'s "negative" experience with the *Parléments*, constitutional review was not re-established until the twentieth century. After some experiment in Austria and Germany[4] between the two World Wars, after 1945 constitutional review began to be adopted more widely in Europe through the establishment of separate constitutional courts. After the "first wave" of constitutional courts - instituted immediately after the war in Germany, Italy, Austria (and also France)[5] - another "wave" characterized, in the 1970s, the return to democracy in

[3] As we are going to point at, professional socialization is today often entrusted to specialized judicial school, one of the most important changes of the last decades.

[4] German judges played a significant – and much critized – role in the Weimar Republic (Rehder 2007).

[5] Constitutional review in France was instituted in 1958, but with specific traits. Only later, especially since 1974, it has evolved, slowly assuming a judicial profile (Shapiro and Stone 2002).

Southern Europe, while the 1990s have seen the spreading of constitutional review to former Communist countries in Central and East Europe.

The institution of judicial review of legislation has had a profound impact on the role of the judge, even if, following the model envisaged by Hans Kelsen, it has been concentrated on a separate, specialized court. For example, through "incidental" proceedings, litigants have the chance to challenge the constitutionality of the law applied in their case. If this occurs, an ordinary court must assess whether constitutional grounds exist to refer the case to the constitutional court. In this way, ordinary courts represent a necessary filter between the litigants and constitutional adjudication, and these courts exert a significant degree of influence over access to the constitutional court. In addition, often ordinary courts may raise constitutional issues on their own volition in the course of a particular case, and such proceedings can then become an instrument for furthering some form of judicial policy: asking for a constitutional court ruling can be a means of promoting the personal values of individual judges and even those of their reference groups. Consequently, the ordinary judiciary becomes an integral part of the process of constitutional review, even though this function is entrusted to a separate specialized court.

At any rate, it is clear that all constitutional courts do not bind themselves to what Kelsen described as "negatively legislating". Their task is not only to rule yes or no on a constitutional complaint. The decision-making procedures the courts have established also allow them to participate actively in the policy-making process. As it has been remarked, when constitutional courts "announce legally binding interpretations of statutory provisions, they rewrite or amend legislation, to the extent that the court's interpretation meaningfully differs from that of the government and parliament." (Stone Sweet 2000: 63). This practice has had an impact on ordinary judges. They increasingly "use the techniques of constitutional law adjudication," in order, for example, to adapt parliamentary statutes to constitutional principles and values (Stone Sweet 2000: 128-129). Thus, if, in comparison to their American counterparts, ordinary judges in continental Europe seem to play a lesser part in the process of constitutional review of legislation, since the final decision has

been entrusted to special courts, the introduction of judicial review has had per se an impact on the way they define their role. The traditional deference toward legislation has been eroded and today judges tend to scrutinize in depth ordinary laws according to constitutional norms, with the result that judicial creativity has been substantially enlarged (Cappelletti 1989: 3-55).

This trend has been supported by the establishment and gradual expansion of supranational systems of justice, such as those created by the European Union and the European Convention of Human Rights. Ordinary courts have seen new areas of intervention opened and their discretionary powers extended. European Community law has become a system of supranational positive norms endowed with a large set of relatively coherent rules that limit the sovereignty of member states. For instance, as it is well-known, the European Court of Justice has developed the "direct effect" and the "supremacy" doctrines: the direct application of community law to member states, and subsequently its pre-eminence over national legislation, so that in case of conflict community law prevails over national. On the basis of this, the Court has also declared that ordinary national courts have the right and duty to directly enforce community law within their own legal systems. This creates the possibility that national norms deemed inconsistent with community law will be rejected and, as a result, creates a sort of diffuse constitutional review that is a novelty in the European context. This process has been furthered by the emergence of a set of legal principles often defined as the "European constitutional heritage" (Pizzorusso 2002), which is exerting a growing influence on European and national judges. Moreover, this sort of supranational dimension has been strengthened by the trend toward network building that today relates many judicial—and quasi-judicial—bodies in Europe: constitutional and supreme courts meet on a regular basis in order to exchange information and points of views on legal matters, a fact that cannot but have an impact on the way these courts—and the national judiciaries—interpret the law.

If the introduction of judicial review of legislation in many European countries has increased judicial creativity – therefore, affecting the relationship of the judge to the

(statutory) law - the creation of judicial self-governing bodies has considerably influenced another dimension of the relation between judges and the political system – that with the executive - and both developments have increased the political significance of the judiciary. The impact of the higher councils of the judiciary - collegiate bodies, composed in different ways of judges and lay members — in charge of administering the status of judges has been a more or less radical alteration of the organizational setting of bureaucratic judiciaries. In fact, one of the main consequences of the institution of a higher council of the judiciary is—rather obviously—an increase of the *external* independence of the judiciary, since the traditional power of the executive comes out circumscribed. But since no higher council is composed solely of judges, an important role remains for the institution in charge of appointing the non-judicial members. This is often assigned to parliament, which allows political parties to bypass the minister of justice, whose powers tend to be weakened, and influence the judiciary directly. The creation of a self-governing body also has consequences for the *internal* independence of the judiciary. Entrusting promotion and appointment of judges to a collegial body where normally all judicial ranks are represented contradicts the traditional hierarchical principle, whereby only higher-ranking judges are entitled to evaluate lower-ranking colleagues. In this way, the lower ranks acquire a new power, since they can participate in the process of choosing higher-ranking judges.

The erosion of hierarchical links has a considerable impact on civil service-style judiciaries: for instance, higher councils have increased the role of a new significant actor, the judicial associations. The experience of Latin European countries suggests that the creation of judicial self-governing bodies is capable of producing a radical change in the judiciary's traditional hierarchy; this in turn can diversify the judiciary's reference group which is becoming more horizontal and, at least in part, placed outside the judiciary, as the growing significance of the relationships with the media shows.

The main consequence of all these changes has been an increase of the political significance of European courts. Although there are variations from case to case – with Latin countries seeming to exhibit more activist courts – the judicialization of politics has

began to characterize also Europe. Moreover, the increase also of the internal dimension of independence allows more autonomy to single judges in their decisions: in other words, the role of the judge cannot be any longer understood as a mechanical applier of the parliamentary will. Traditional instruments for monitoring judicial performance - such as hierarchical supervision and control – are less and less available.

4. Some lessons and consequences

The expansion of judicial power that we have just described in broad terms is having a strong impact on our systems of courts. It has raised the expectations of the public regarding the administration of justice, a fact leading also to an increase of the number and quality of cases, since more power implies also more demands that power be used. So, in a very time of budget's constraints courts are urged to produce at the same time more and better decisions in reasonable time. In the meanwhile, the building of the European Judicial Space has increased the complexity of the legal system and the need of interacting with the legal actors (judges, prosecutors, lawyers…) of other European countries. This last aspect needs to be emphasized, since it does not regards only the highest courts. All judges – in fact, all judicial actors – have to interact with their European counterparts. The judicial dialogue does not involve only the highest courts. A good example is the case of the European arrest warrant, where judges and prosecutors of the different member States have to deal one with another.

The lessons to draw from this situation are several. First of all, the demand for quality highlights the importance of court management. Judicial performance cannot be improved without adequate organizational diagnoses and the implementation of congruent prescriptions, that is prescriptions based on the development of an empirically based discipline. The recent decades have seen also in Europe the birth and the development of the discipline of court management: actually, several people here belong to research centres that have contributed to this development: the Istituto di Ricerca sui Sistemi Giudiziari of the National Research Council (CNR) in Bologna, the Institut des Hautes Etudes sur la Justice in Paris, the Montaigne Centre for Judicial Administration

and Conflict Resolution at Utrecht University, the Centre of Empirical Legal Studies at the University College in London.

Inside the judicial organization, the main actor is, of course, the judge. As we have seen, her behaviour cannot any longer be defined in simple, mechanical terms, with the consequence of increasing her role in the judicial system and, therefore, the significance of judicial education.[6] It is not by chance that in recent decades most European countries – and the process is not limited to Europe – have instituted judicial schools and that the European Judicial Training Network is one of the most active. The complexity of judicial tasks today implies that the process of judicial education cannot limit itself to the teaching of positive law. Space should be reserved also to theoretical or philosophical disciplines. More, as a recent survey has pointed out (Thomas 2006, 55 ff.), the good judge is in need of several additional skills, besides the traditional mastering of substantive law:

- Knowledge of the social context of law and the judicial process;
- Specific skills related to court activity, such as opinion writing, dealing with expert evidence, vulnerable witnesses, unrepresented litigants, and the use of mediation and alternative dispute resolution techniques;
- Judicial ethics: e.g. avoiding bias in judging or conflicts of interests;
- Judicial skills – an expanding field: managing courts and staff, interacting with the public and the media, using new technologies…

Moreover, we cannot disregard the fact that "the training of the judge … will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due." (Cardozo 1921:176) Thus, judicial education should be understood also as a way to check in a physiological way the new power judges are enjoying.

We can add that judges are not only lawyers but they continuously interact with other lawyers. So, what we have said of judicial education regards, to a large extent, also the education of lawyers. In any case, the beneficial effects of a common education of the

[6] I.e. "give intellectual and moral training" (OED) to the judge.

legal professions, and especially of those whose main task is more or less related to courts, should be recognized.

Therefore, the analysis, evaluation and – possibly – reform of the systems of legal and judicial education are a way – an effective way, I think – to help the administration of justice to cope with an increasing array of tasks. The answer to the questions we are going to pose in this project could become an important step in the process of designing an effective system of legal and judicial education.

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